Mark Savage (Appellant) v. Data Protection Commissioner (Respondent) and Google Ireland (Notice Party)
Record No. 2015/02589

Delivered by Judge Elma Sheahan on the 11th October, 2016.

A. The Concept of "The Right To Be Forgotten"

1. The case of ***Google Spain SL and Google Inc. v. Agencia Espanola de Proteccion de Datos and Mario Costeja Gonzalez Case C-131/ 12,13 May, 2014 (Google Spain case)*** established the "right to be forgotten" whereby one might seek to have personal data held by a third party web page delisted from a data controller's search engine (Google Inc.).

2. The Court found *inter alia* that:

"(a) the activity of a search engine .... constituted the processing of personal data within the meaning of Article 2(b) of Council Directive 95/46/EC when that information contained personal data."

(b) that the operator of the search engine was "the controller" in respect of that processing within the meaning of article 2(d) and

(c) "it was irrelevant that the operator (data controller) did not exercise control over the personal data published on the web pages of third parties, but that the operator of the search engine, as the person determining the purposes and means of that activity, had to ensure that the activity met the requirements of the Directive in order that the guarantees which it laid down might have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, could be achieved".

(d) that the relevant data could be removed by the Operator, following a search made on a person's name, by removing links to web pages published by third parties containing information about that person even where the information remained live and had not been removed from those web pages. The Court noted that the role of the Operator made access to personal information appreciably easier and could play a decisive role in the dissemination of that information and was therefore

liable to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web page.

3. At para. 80 of the Court's decision, it states:

> "*processing of personal data……, carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search .... Is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured over view of the information relating to that individual that can be found on the internet……. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous.*"

4. Paragraph 81 deals with the need for balance between competing rights, i.e. the legitimate interest of internet users potentially interested in having access to that information and the data subject's fundamental rights under Articles 7 and 8 of the Charter of Fundamental Rights which as a general rule override the interest of the internet user but this depends on the specific case and the nature of the information in question and its sensitivity for the Data subject and the interest of the public in having access to it. The role of a person in public life might shift that balance depending on the nature of the information.

B. <u>"Article 29 Working Group"</u>

5. Following on from that decision, an "Article 29 Working Group" an independent advisory working party, consisting of among others the Data Protection Authorities (DPA) to advise the various Data Protection Commissioners (DPC) subject to that decision on how they might uniformly apply criteria or tools in their consideration of such an application.
6. These tools or criteria are said to be flexible in their application and no one criterion on its own is determinative.

C. Domestic Legislation

7. The Data Protection Commissioner (DPC) in this jurisdiction has a set of procedures which she follows when an application is made to her by a Data Subject (The Appellant) and this Court finds no issue with the manner in which those procedures were followed.
8. The Data Protection Acts, 1988 and 2003 are the relevant Domestic Legislation and Directive 95/46/EC relates to the protection of individuals with regard to the processing of personal data.

Data Protection Acts 1988 and 2003:

9. Section 1(2) states that for the purposes of this Act, data are inaccurate if they are incorrect or misleading as to any matter of fact.
10. Section 2(1) requires that personal data shall be processed fairly and that it shall be accurate and complete. Section 2(1)(c) requires that data shall be adequate, relevant and not excessive in relation to the purpose for which they are collected or are further processed.
11. Section 6 relates to the Data Subject's Right to Rectification or Erasure. It states inter alia that an individual shall be entitled to have rectified or where appropriate blocked or erased, any such data in relation to which there has been a contravention by the Data Controller (Google) of Section 2(1). It goes on to state that the Data Controller shall be deemed to have complied with the request, if he supplements the data with a statement relating to the matters dealt with by the data and if he supplements the data aforesaid, not to be in contravention of paragraph (b) of section 2(1).
12. Section 7 states that a Data Controller owes a duty of care to a Data Subject and that this duty will have been met, where, having received information from a third party which it accurately records, carries with it, where appropriate, an indication that the data subject has informed the data controller that he regards the information as inaccurate.
13. Section 10 of the Act sets out the power of Commissioner to require a Data Controller to block, rectify, erase or destroy any data which it considers not in compliance with Section 2(1). It further provides that an enforcement notice relating to inaccurate data may require a Data Controller to supplement the data

with such statement relating to the matters dealt with by them as the Commissioner may approve of.

D. European Legislation

14. Article 1 of the Directive 95/46/EC deals with the protection of individuals with regard to the processing of personal data and on the free involvement of such data states:

> " *Article 2(a) 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;*
> *Article 2(b) 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;*
> *Article 2(d) 'controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law.*"

15. Article 17 states that the Data Subject has the right to request erasure of personal data related to him on any one of a number of grounds: where the legitimate interests of the controller is overridden by the interests or the fundamental rights and freedoms of the data subject, which require protection of personal data.

16. Article 7 of the Fundamental Charter on Human Rights provides that everyone has the right to respect for his or her private and family life, home and communications. Article 8 guarantees everyone the right to protection of his personal data.

E. Backround Facts

17. On the 31st August, 2014, the Appellant herein made a complaint to the DPC regarding a web page called Reddit.com which contained the URL title "Mark Savage North County Dublins (sic) Homophobic Candidate" without the parenthesis, which was published on the 23rd May, 2014. This web page was listed in Google's search results when one entered his name into the search engine. Mr. Savage had run as a local election candidate where among other issues he had campaigned on the issue of the need to curb the activities of the gay community which, according to him and a Sunday newspaper, had been engaging in sexual activity on a North County Dublin beach during daylight hours.
18. As already stated above, the DPC advised the Appellant on a procedure to follow, which was followed and resulted in Google (Notice Party) refusing to take down the link to the Reddit.com web page because it was of the view that as a public figure who had been a candidate in local elections, he had inserted himself into a debate on matters relating to the gay community by publishing a leaflet on the topic, a discussion on some of which was carried under the URL title, and that this constitued a matter of strong public interest and identified the political and cultural positions of past candidates which internet users ought to have access to now and in the future. Google was of the view that this information related to the Appellant's public persona rather than his private life.
19. The Appellant accepts that the content of the discussion thread under the URL title constitutes freedom of expression and is in the public interest. However, his point as it has been explained to me and as I understand it, is that he denies the stance he took can accurately define him as a homophobe and that the URL asserts this as a fact without any qualification or parenthesis and as a result constitutes inaccurate data, appearing as he argues it does, as a verified fact.

20. The Appellant then appealed the decision of the Notice Party (Google) to the DPC and she gave her decision on the 26th March, 2015.

21. The Data Protection Commissioner concluded there had been no contravention of the Data Protection Acts, 1988 and 2003. In coming to her decision she outlined the criteria which were considered by her. The criteria used was set out as follows:

> *(a) "Does the data subject play a role in public life? Is the data subject a public figure? – As per the response received from Google you ran for public office as Councillor to Fingal County Council in the 2014 local elections.*
>
> *(b) Is the data accurate? – Section 2(1)b of the Data Protection Acts 1988 & 2003 requires that data shall be accurate. In general 'accurate' means accurate as to a matter of fact and this link remains accurate in that it represents the opinion expressed of you by a user of the relevant forum. As to the quality or otherwise of that opinion, that is not a matter for this office.*
>
> *(c) Is the data relevant and not excessive? – Section 2(1)(c)(iii) of the Data Protection Acts 1988 & 2003 requires that data shall be adequate, relevant and not excessive. You stated in an email to this office dated 6th March, 2015 that the discussion content of this URL is relevant to the public interest as you ran for public office.*
>
> *(d) Is it clear that the data reflect an individual's personal opinion or does it appear to be verified fact? - It is clear that the original poster is expressing his/her opinion.*
>
> *(e) In what context was the information published? Was the content voluntarily made public by the data subject? – The URL is to a particular discussion topic on an on-line discussion forum. The discussion topic relates to the poster's opinion of you based on material disseminated by you to the public during your election campaign in 2014. It must also be noted that you took part in the on-line discussion and posted three separate entries. "*

22. The reasoning behind this decision was further explained by way of further written submission in reply to queries raised by the Court, where it is stated as follows:

> *"No.5: Question: Did the DPC turn her mind to the question as to whether the text of the URL was fact or opinion?*
>
> *The DPC did address the question as to whether the text of the URL was fact or opinion. The Appellant would have a right of take-down of the URL per the Google Spain ruling if the link complained of was inaccurate, out of date, excessive or irrelevant. In order to consider whether the URL was inaccurate, it was necessary to consider whether it was accurate as a matter of fact. The Commissioner deemed the URL to accurately represent the fact that a poster to the Reddit online discussion forum (a link to which is in issue in this case) posted such a message since the link itself is the message title. The Commissioner went further to examine whether the content of the message title represented fact or opinion given that the title is what the Appellant argued was inaccurate and she concluded that it accurately represented the opinion of the user who posted it based on the following features:*
>
> - *The URL is a link to an online discussion forum where individual online users post their views on a variety of topics. As an online discussion forum, it trades in opinions and views as shared as between its online community. Therefore anything represented on it is unlikely to be qualified as to its factual accuracy but rather represents a perception of a particular online user.*
> - *The user in question who posted the material that the Appellant objects to had read the Appellant's election leaflets in which, by his own assertions to the DPC, he included material that set out his views as that of "disgust at gay perverts engaging in public lewdness and gross indecency on a public beach in broad daylight in proximity of children". He also indicated to the DPC that his election leaflet included a photograph of him: "Wearing a t shirt*

with 'stop aids now' to signify my concern for the rising rates of HIV infection among men who engage in buggery with men in anonymous situations in public beaches such as Donabate beach in North County Dublin".

- *The Commissioner therefore formed the view that the online user on the discussion forum (the URL link to which is the issue in this case) who posted in relation to the "northside's homophobic candidate" was expressing a personal opinion on the appellant based on the election material he read rather than making a finding of fact. The Commissioner is also of the view that any individual user of the internet seeking out facts in relation to any topic is unlikely to consult an online discussion forum such as Reddit as a source of verified facts.*
- *This case required a balancing of the limited right to erasure in certain circumstances on the one hand against the right of freedom of expression (which includes a right of access to material on the internet) on the other. The right of freedom of expression supports the expression of opinion, particularly in the context of individuals considering election candidates putting themselves forward for public office."*

23. The decision of the DPC is the subject matter of this Appeal to the Circuit Court pursuant to section 26 of the Data Protection Acts 1988 & 2003.
24. Written submissions were filed by all parties to the Appeal and the Court heard Oral submission from Counsel on behalf of the Respondent and Counsel on behalf of the Notice Party.
25. The Court acknowledges the manner in which the case was presented, in particular as the Appellant was a lay litigant, Counsel for the Respondent aided the Court in explaining the Appellant's position in a concise and direct fashion.
26. The Appellant argues in writing, *inter alia*, that users of the internet, now more than ever, rely on it for ascertaining information, and therefore the need for accuracy regarding factual information on same is of paramount importance. He says that such a user, having inserted his name into the Notice Party search

engine, would form the view that he had run in the local elections as a homophobic candidate given the manner in which the wording of the URL title "Mark Savage North County Dublins (sic) Homophobic Candidate" (without the parenthesis) is displayed by Google, as the Data Controller and that this assertion which has the appearance of a verified fact, is inaccurate, excessive and inadequate.

27. The Appellant was unable to make contact with the author of the title to the discussion board, and Reddit.com who hosted the discussion on its web page, refused his request to remove the data, on the basis that it does not remove "allegedly defamatory material".

28. I have read the submissions and considered the arguments put forward by all parties.

29. To summarise the position of the Respondent and the Notice Party, I think it is fair to say that in response to the Appellant's main ground of appeal and the only one presented before this Court, the title to the URL is clearly the opinion of the poster because (a) it is in keeping with what is contained in the following discussion thread, to which the Appellant was a contributer, (b) the topic under discussion and (c) the actions of the Appellant during the election campaign. The Respondent found that the title/data was accurate as to fact, in that it was posted by the Poster and reflected his opinion of the Appellant. She expressed no view on the quality of that opinion.

30. There was no engagement with the central point made by the Appellant that if it was an opinion it should be obvious, or made obvious, that this was so, as it was presented, it appeared to be a verified fact. He argues that the absence of quotation marks gives it the appearance of a verified fact.

31. If one looks at the criteria laid out by the Working Party for consideration when a DPC is adjudicating on an application to de-list data held by a Data Controller on a Data Subject, the fact that a Data Subject might be a public figure, mitigates against de-listing information which might be relevant to that role and the public might have an interest in being aware of this. However another relevant consideration is whether the data is accurate? It says:

"DPA's will be more likely to consider that delisting of a search result is appropriate where there is inaccuracy as to a matter of fact and where this presents an inaccurate, inadequate or misleading impression of an individual".

32. It is explained in that document that "*Where a data subject objects to a search result on the grounds that it is inaccurate, the DPAs can deal with such a request if the Data Subject provides all the information needed to establish the data are evidently inaccurate.*"
33. Mr. Savage contends that title of the URL in issue is a statement of fact, or has the appearance thereof, which is untrue and inaccurate, and set out in his correspondence and affidavit, why this was so. In his submissions he states that he believes he will be disadvantaged or prejudiced by this inaccurate factual assertion being allowed to stand, without qualification or disclaimer in terms of his employment prospects, or other future plans. It is accepted by Mr. Savage that the contents of the discussion thread or forum beneath the URL clearly involves the exchange of views and constitutes the expression of opinions and is not objected to by him.
34. Where there is a dispute about the accuracy of information and that dispute is ongoing, it appears that the DPC may choose not to intervene until the process is complete. In this matter, the Court has been told that the Appellant has issued a number of defamation writs and it is argued that the Appellant has sought to use the Data Protection legislation to support his defamation actions.
35. It is accepted by all parties that while DPA's are generally not empowered and not qualified to deal with information that is likely to constitute slander or libel, the DPA's remain competent to assess whether data protection law has been complied with or not and this, the DPC has sought to do in this instance. This Court considers this application in the context of this Appeal under the Data Protection Acts and expresses no view regarding any defamation proceedings which may be in being.

F. DECISION

36. The case law and legislation refer to the importance of the data being held by a controller in a manner which is fair and accurate. This involves the balancing of the rights between the internet user and the rights of the Appellant. It is fair to say that in this case the Notice Party, and the Respondent came to the conclusion because of the backround to the discussion thread in question, where the Appellant injected himself into a debate on the activities of the gay community while running for local office, that the balance fell in favour of the User, who has the right to access views expressed by the Appellant, and that the URL in question was the clearly expressed opinion of the person who posted the URL on *Reddit.com*.

37. This is an Appeal of a Statutory nature and as such the Court has to be mindful of the expertise of the DPC in the role she carries out and acknowledges this.

38. O'Donnell J., in ***Nowak v. DPC 28/04/2016*** in the Supreme Court found that the appropriate appeal provided for, pursuant to s.26 of the Data Protection Acts was one which followed the *Orange* test i.e. that a decision will be set aside on appeal if it is wrong in law or if it is vitiated by a serious error or series of errors. He stated:

> "*A court can be expected to detect errors of law and may identify serious errors in reasoning or approach. It can be said that if an error is sufficiently clear and serious to be detectable by a non expert court after scrutiny, then that is justification for overturning the decision, even though the court may lack more specific expertise*".

39. The *Orange test* itself specifically refers to the requirement that regard be had to the degree of expertise and specialised knowledge of such a tribunal.

40. The DPC issued her decision on the 26th March, 2015 and set out her reasons for same. In her affidavit sworn verifying the statement of opposition, Ms. Dixon at para. 31 sets out how she came to her decision and issues she considered in doing so.

41. Having conducted that analysis she issued her decision. She concluded that the inclusion by Google of the URL in issue when a search was carried out against the Appellants name could not be considered unwarranted by reason of prejudice to his fundamental rights and freedoms or his legitimate interests. Further she was unable to conclude that there had been any contravention of the Data Protection Acts by reason of Google's refusal to accede to the Appellant's de-listing application.

42. She states that the Applicant's complaint was largely targeted at the allegedly defamatory nature of the text contained in the URL in issue, and in this regard she states she has no role to play in assessing whether or not material contained in the particular URL link is defamatory of the Appellant, nor can she provide any remedy in that respect. Her role, she states is limited by statute, to an examination of complaints by reference to relevant provisions of the Data Protection Acts, as interpreted by the relevant courts.

43. In so far as there is any suggestion made by the Appellant that the DPC approached her decision other than in an objective or unbiased manner, I reject such a suggestion as baseless and without foundation. No such issue was found by this Court regarding the procedures followed by the DPC.

44. As such the case law would suggest that this court ought only to interfere with a decision of the DPC where it finds:-

    (a) An error of law or

    (b) If there is a serious error or a series of errors made by the DPC in coming to her decision.

45. In reality, this Appeal turns on the consideration of a narrow premise. The DPC in her decision at paragraphs (b) and (d) arrives at a conclusion that the data in question is accurate because:

    (b) "*In general 'accurate' means accurate as to a matter of fact and this link remains accurate in that it represents the opinion expressed of you by a user of the relevant forum. As to the quality or otherwise of that opinion, that is not a matter for this office.*"

And further at para (d) she states:

(d) *"Is it clear that the data reflect an individual's personal opinion or does it appear to be verified fact? - It is clear that the original poster is expressing his/her opinion."*

46. Upon consideration of the above issues, this Court arrives at a conclusion which is to the contrary. This Court takes the view that if one were to simply consider the URL title, and apply the reasoning of the DPC, it is not accurate by virtue of the fact that it is simply not clear, that it is the original poster expressing his or her opinion but rather bears the appearance of a verified fact.

47. It may well be the case that upon further or full consideration of the entire thread, to include the contribution of not alone the original poster but the Applicant also, it would become clear that the original poster is expressing his or her opinion.

48. However, upon the Search Engine returning, on foot of a search for the Applicant, the URL heading "Mark Savage North County Dublins Homophobic Candidate", without the parenthesis, the position is far from clear that it is the expression of a poster's opinion as found at (b) and (d) above.

49. It is on this narrow basis and this basis alone that I must conclude that the DPC fell into error such as justifies, warrants or indeed mandates the Court's interference.

50. The reasoning or logic as communicated by the DPC leaves open the possibility of elevating a statement of opinion from the body of any such discussion forum to the status of accurate data, by merely accurately transposing the data from the body of the posting or thread to a URL heading, in the absence of any indication that it is actually requoting such a view.

51. If the expression of an opinion is to constitute accurate data in circumstances such as this, one would have expected at a minimum, that it would be carried within quotation marks or parenthesis. This simple step ought properly to have been taken and would have eleviated the present difficulties. In the absence of such an amendment, in its present format I do not believe it constitues "accurate data" or communicates that it is "clearly the expression of the opinion of the original poster."

52. In coming to the decision I have, I have had regard to the *dicta* of O'Donnell J., in ***Nowak v. DPC 28/04/2016*** and believe that even as a non expert Court, after scrutiny of the DPC's decision, and consideration of the oral and written submissions, the case and legislation, this Court can detect sufficient errors which justify the decision as set out above. By reason of these, the Court takes the view that the Appellant's fundamental rights and legitimate interests have been prejudiced.

53. I accept that the actual procedures followed by the DPC were appropriate. I accept that the DPC assessed the criteria of the Art 29 Working Group and the reasoning of the Court of Justice in the "***Google Spain***" decision before coming to her decision. However as set out I disagree with the findings she made for the reasons set out.

54. Given the acknowledged ubiquitous nature of the internet and the accessing of it for all types of information, irrespective of whether the Data Subject is a public figure or not, I am of the view that the balance of rights which I have to consider, in the circumstances of this case, falls in favour of the Appellant, notwithstanding the fact that he was a public figure, for the reasons outlined. I am not convinced by the submission that "*any individual user of the internet seeking out facts in relation to any topic is unlikely to consult an online discussion forum such as Reddit as a source of verified facts.*" given the manner in which a search engine operates.

55. Therefore I will uphold the Appeal and on the application of Counsel for the Respondent, adjourn the matter to the 25th October, 2016, for mention, to consider the appropriate Order to be made.